

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-7009

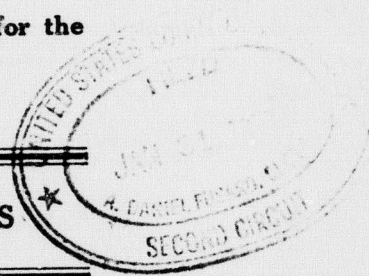
United States Court of Appeals
FOR THE SECOND CIRCUIT

WILLIAM R. VAN GEMERT, *et al.*,
Plaintiffs-Appellants,
against

THE BOEING COMPANY,
Defendant-Respondent.

On Appeal from the United States District Court for the
Southern District of New York

BRIEF FOR PLAINTIFFS-APPELLANTS



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DOCKET NO.
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On Appeal from the United States District Court
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BRIEF FOR PLAINTIFFS-APPELLANTS

THE ISSUES PRESENTED FOR REVIEW

1.

Does New York state law determine in this case
a) the measure of damages and b) the right to prejudgment
interest?

2.

Under New York state law are damages to be measured
by the price of the stock on the date of breach or by its
highest price within a reasonable time (specifically 16 days)
thereafter?

3.

Under New York State law is it mandatory that interest be added to the damages to be awarded?

STATEMENT OF THE CASE

1.

Nature Of The Case

In this representative class action, holders of The Boeing Company's 4-1/2% Convertible Debentures of July 1, 1980, who were refused conversion of their debentures on and after March 29, 1966, sued for the damages which they suffered as a result of such refusal. This Court has held that plaintiffs are entitled to recover and remanded the case to the District Court to determine the amount of the damages (520 F2d 1373).

The District Court granted judgment in the sum of \$3,289,359. The present appeal by plaintiffs is a) from the insufficiency of the amount awarded by the District Court and b) from the denial by that court of prejudgment interest.

2.

The Course Of Proceedings

The action was begun on June 23, 1966. The trial was held from November 15 through November 20, 1972. Judge Sylvester J. Ryan dismissed the complaint and directed entry of judgment for defendant (filed November 30, 1973). This Court, on July 14, 1975, reversed and remanded the case to Judge Ryan to fix plaintiffs' damages.

This Court stayed its mandate pending determination of defendant's petition to the Supreme Court for certiorari; the Supreme Court, on November 11, 1975, denied the petition; and the remand proceedings followed before Judge Ryan. Plaintiffs served interrogatories directed to the present issues and defendant served responses thereto.

Thereafter, on motions for judgment and briefs, without a hearing, Judge Ryan held and signed a Judgment and Order (filed December 28, 1976) which provided:

1. that plaintiffs recover \$3,289,359;
2. that each member of the class recover \$316.25 for each \$100 face debenture which he held, less any sum which he has received if he has redeemed his bonds;
3. that plaintiffs recover postjudgment interest only;
4. that the attorneys submit plans for distribution of the recovery;
5. that the attorneys submit applications for their counsel fees and
6. that the court retain jurisdiction pending implementation of the Judgment and Order (364-5)*.

*Numbers in parentheses refer to pages of the Appendix.

3.

The Facts

Since the opinion of this Court (520 F2d 1373) sets forth the basic facts, we shall mention only those which are germane to the present appeal.

The debentures, issued July 1, 1958, were to mature on July 1, 1980 unless sooner called. At any time prior to maturity or, in the event of prior call, at any time ten days or more prior to the redemption date holders were entitled to convert their debentures at the rate of two shares of Boeing stock for each \$100 face amount of debenture. On March 8, 1966 Boeing published in the Wall Street Journal a notice to the effect that it would redeem the debentures on April 8, 1966 and that conversion rights would expire on March 29, 1966.

This Court held that the "notice" was insufficient and that plaintiffs were entitled to their damages for Boeing's refusal to convert.

The closing price of Boeing stock on the New York Stock Exchange on March 29, 1966 was 158-1/8. [The closing price on April 7, 1966 was 165-3/4 (April 8 was Good Friday).] The closing price on April 14, 1966 was 182. On the remand, Judge Ryan has awarded plaintiffs the difference between a) the price of two shares on March 29, 1966 - \$316.25 - and b) the redemption price of \$103.25 (358-9).

The appeal is from Judge Ryan's refusal to apply the New York measure of 182, the highest price reached within sixteen days after the breach, and from the denial of pre-judgment interest (364-5).

ARGUMENT

POINT 1

THE LAW OF NEW YORK IS APPLICABLE TO BOTH ISSUES

A. This Court Has Decided Both Issues

We respectfully submit that this Court decided in Givens v. W.T. Grant Co. 457 F2d 612 (CA 2, 1972) that the state law governs the damages question and in Spector v. Mermelstein 485 F2d 474 (CA 2, 1973) that the state law governs the interest question.

B. The "Source of the Right", State or Federal, Determines the Applicable Law

While, immediately after Erie, there was some confusion as to whether state common law or federal common law applied to cases where jurisdiction of the action had been acquired under federal law, it has been clear for at least two decades that where the substantive right has its source in state law the remedy is governed by that state's law.

In Maternally Yours v. Your Maternity Shop 234 F2d 538, 540-1, note (CA 2, 1956) federal jurisdiction was grounded in the Lanham Act. The complaint sought damages under that

Act for infringement of plaintiff's trade-mark and at common law for unfair competition. Judge Waterman wrote:

"But despite repeated statements implying the contrary, it is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. See, Hart & Wechsler, *The Federal Courts and the Federal System* (1953) 690-700. Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. (Citation). Likewise, the Erie doctrine is inapplicable to claims or issues created and governed by federal law, even if the jurisdiction of the federal court rests on diversity of citizenship. (Citations). Therefore, this court's holding in the Spiegel case, *supra*, when viewed in conjunction with *Artype, Incorporated v. Zappulla, supra*, would appear to require the application of state law to unfair competition claims, whether or not combined with a trade-mark infringement claim under federal law." (*Italics by the Court*).

In Austrian v. Williams 198 F2d 697 (CA 2, 1952) jurisdiction was under the Bankruptcy Act. The action was for wrongdoing by corporate directors; thus the gravamen of the action or, in Judge Waterman's words, the "source" of the right was in state law. The District Court had held that New York law applied but had then refused to follow the New York Courts' interpretation of its statutes. Judge Chase, after holding that New York state law was applicable (rather than Virginia state law) wrote at p. 700:

"The refusal of the district court to follow the New York courts' interpretation of the New York statute of limitations was due largely to the assumption that since federal jurisdiction was conferred by the Bankruptcy

Act, Williams v. Austrian, 331 U. S. 642, 67 S.Ct. 1443, 91 L.Ed 1718, it was not compelled to reach its decision in conformity with state decisional law as it would if diversity of citizenship was the basis of jurisdiction ***.

"The fact that diversity jurisdiction is lacking does not, alone, preclude a result similar to that which would be reached if there were such jurisdiction. ***

(P. 701): "In Holmberg v. Armbrrecht, 327 U.S.392, 66 S.Ct.583, however, the state statute of limitations was being applied to a federally created cause of action while here the cause of action is state created. The distinction as to the source of the cause of action was emphasized by the Supreme Court ***"

The Supreme Court had, some years before, made clear that if the source of the cause was federal, the state court was required to apply federal law. Under the federal Jones Act, injured parties might sue in the state courts for the relief granted by the federal law. In Garrett v. Moore-McCormack Co. 317 U.S. 239, 87 L.ed.239 (1942) Mr. Justice Black wrote for the Court at p. 245):

"The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the state. So here, in trying this case the state court was bound to proceed in such manner that

all the substantial rights of the parties under controlling federal laws would be protected." (Underscoring ours).

Similarly in Wichita Royalty Co. v. City National Bank of Wichita Falls 306 U.S. 103, 83 L.ed. 515 (1939) where a state court case was removed to the federal court solely because the national bank became insolvent and resolution of its problems came under the national banking law, Stone, J. wrote at p. 107:

"It was the duty of the federal court to apply the law of Texas as declared by its highest court."

C. The Source of the Right Here is State Law

Under the heading: "The Inadequacy of the Boeing Notice", this Court wrote:

"The duty of reasonable notice arises out of the contract between Boeing and the debenture holders **. An issuer of debentures has a duty to give adequate notice either on the face of the debentures, (Citation), or in some other way, of the notice to be provided in the event the company decides to redeem the debentures." (Underscoring ours). (520 F2d 1373, 1383).

That was the ground of decision.

We quote from two of the many Law Review notes on the subject:

89 Harv. L.R. 1016, 1019 (1976): "Issuers have a state law duty to give reasonable notice of call to holders of convertible debentures." (Underscoring ours).

42 Brooklyn L.R. 1259, 1271: "The Court, therefore, seemingly established a wider ground on which plaintiff could hold Boeing liable, viz., a breach of the implicit duty arising out of a contract between a company and the holder of its convertible debentures***."

Boeing unequivocally agrees. In its Reply Memorandum before Judge Ryan, it wrote:

"Plaintiffs' [referring to the brief submitted by the Kass firm] position is clearly wrong. The Court of Appeals simply did not decide that plaintiffs had stated claims under the Federal Securities Laws, but only that jurisdiction over all of plaintiffs' claims could be retained by the federal court because their Securities Acts claims were sufficiently 'colorable'. 520 F2d at 1380-82. The case was clearly decided as a new state of common law action - and nothing more. 520 F2d 1383-86." (Underscoring ours).

POINT II

THE NEW YORK RULE OF DAMAGES ENTITLED PLAINTIFFS TO MEASURE THEIR DAMAGES AT APRIL 14, 1966

- A. The New York Rule Is That One Who Has Been Deprived of Securities of a Fluctuating Value May Fix His Damages at the Highest Price Between the Date of the Wrong and a Reasonable Time After He Has Received Notice of the Wrong

The wrong here was on March 29, 1966. Since it is impossible to establish the date on which each plaintiff had notice we have made the assumption most favorable to defendant - that the plaintiffs had notice on March 30, 1966.

Correspondence produced by defendant shows clearly that most class members received notice when they deposited their July 1, 1966 coupons and the coupons were returned. The Boeing correspondence with members of the

class generally began in August, 1966. Some members doubtless had notice before that].

The New York rule is that, whether the action be in contract for non-delivery or in tort for conversion or other wrong, damages for being deprived of securities of a fluctuating value are measured by the highest price attained by the security between the date of the wrong and a reasonable time after notice to the injured party that the wrong has occurred.

Baker v. Drake 53 NY 211, 13 Am R. 507 (1873)

Mayer v. Monzo 221 NY 442, 117 NE 948 (1917)

Hartford Accident & Indemnity Company v. Walston & Co. 22 NY 2d 672, 238 NE 2d 754 (1968)

In Mayer v. Monzo, supra, a stockbroker had assigned for the benefit of creditors and the assignee wrongfully sold out stock which defendant had on margin with the broker. The broker now sued the customer for its loss - the difference between the sellout price and the margin. The customer counterclaimed for the difference between the sellout price and the highest price attained by the stock between the date of the sellout and the time he received notice which he claimed came to him more than a year after the sellout. The Court of Appeals unanimously agreed. Hiscock, C.J. wrote (at p.447):

"The defendant, relying upon this rule says that he did not receive notice of the sale of his stocks for more than a year after

it had occurred, and that taking advantage of the highest prices which prevailed within that period for stocks of the kind carried for him by the plaintiffs he is entitled to an amount of damages which not only would wipe out plaintiffs' claim, but in addition would give him judgment for a substantial amount against them. *** His conclusions are doubtless correct if it is to be assumed that he neither received nor was chargeable with notice or knowledge of the sale of his stocks until the time fixed by him."

The form of the action or the contractual or tortious nature of the wrong is immaterial; for the purpose in either event is just compensation. In Baker v. Drake, supra, Judge Rapallo wrote at p.213:

"It may be as well to remark here as anywhere, that the rule of damages should not depend upon the form of action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or in tort".

If we assume that all plaintiffs had notice on March 30, 1966, we are obviously making an untrue assumption, but wholly for the benefit of defendant. Sixteen days is about as short a period as has ever been found "reasonable". Hiscock, C.J. in Mayer v. Monzo, supra, wrote (at p.446):

"It has been held under varying circumstances that thirty days or fifteen days or sixty days would be such reasonable period."

8. Judge Ryan Refused to Follow the New York Rule Because He Considered It Inequitable

Judge Ryan did not question what the New York rule is. His reasoning, in refusing to follow the rule, was that this Court had fixed substantive liability by applying

"an equitable standard" and "it would be less than equitable for this Court to apply strict New York statutory law" to the damages (358).

[The reference to "statutory law" was doubtless a slip as the rule in Subdivision A above is court-made].

The direct answer to Judge Ryan's position is that where state law is the source, the question is only what the state court does. This is perhaps best expressed by Judge Wisdom in Weakley v. Fischbach & Moore 515 F2d 1260 (CA 5, 1975). Under Texas law, where future damages are to be assessed, the parties may offer proof of the probability of inflation in the future and the jury may weigh that proof. The federal district court sitting in Texas, admitted the testimony and charged that the jury might consider it. Judge Wisdom wrote (at pp.1266-7):

"This Court has writ large its disapproval of calculating future damages by reference to predictions of future inflation (citing a number of cases). These cases all, however, involved claims asserted on federal causes of action. Here, on the other hand, we are controlled by Erie. This and other federal courts have concluded that under Erie state law governs the measure of damages, including the admissibility and jury consideration of evidence of inflation (citing cases).

"Texas law thus controls. *** We must hold, therefore, that the trial court did not err in permitting the jury to consider the evidence of future inflation."

Similarly, in Givens v. W.T. Grant Co. 457 F2d 612 (CA 2, 1972) this Court found no occasion to express its opinion as to the unusual Connecticut state law of punitive damages; it simply found what that law is and applied it.

The second answer to Judge Ryan's position is that not only do the New York courts consider the rule equitable but so too does the Supreme Court which has adopted that rule; to the extent that there is a federal common law it is the federal rule too.

Galigher v. Jones 129 US 193, 32 L.ed.658 (1889)

C. The Damages Should be Increased to \$4,026,762.25

Based on the April 14, 1966 price, the damages should have been \$4,026,762.25 rather than \$3,289,359.

POINT III

THE NEW YORK STATUTE REQUIRES THAT
INTEREST BE ADDED TO THE DAMAGES

A. Judge Ryan Did Not Apply the New York Rule as to Interest

New York's CPLR 5001(a) provides as to interest:

"(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion."

Judge Ryan held that the statute does not apply because the complaint "bases its jurisdiction" on federal securities law plus pendent jurisdiction and that one group of plaintiffs (certainly not we) said that "the merit of their claim" was that Boeing "ran afoul of the securities acts". For those reasons, he held that federal law applied and that

interest was discretionary (360). We have shown at pp.5-8 that the basis of jurisdiction is not the issue but the source of the right and at pp.8-9 that the source here is state law.

Judge Ryan also added that even under state law "the award of interest is discretionary in that it would be inequitable to award interest". (360-11). This Court has held to the contrary in Spector v. Mermelstein 485 F2d 474 (CA 2, 1973).

B. Boeing Concedes that New York Law Applies

Judge Ryan took his position despite the fact that Boeing has conceded that state law governs the question of interest.

On January 16, 1976, we filed interrogatories with respect to damages. Interrogatory No. 15 read:

"15. Is it Boeing's position that the interest to be added to the damages is governed by:
a) the rule applicable in the courts of the State of New York, or
b) the rule applicable in the Southern District of New York, or
c) some other rule, in which case state the rule." (199)

On March 23, 1976, Boeing served its verified responses, including the following answer:

"15. It is Boeing's position that a federal court sitting in New York, would be required to apply the law of the State of New York with respect to the interest, if any, to be awarded to Debenture holders." (209)

C. This Court Holds the New York Statute to be Mandatory

In Spector v. Mermelstein, supra, the action was against an attorney for breach of contract and for violation of fiduciary duty. Defendant argued that since CPLR Section 5001(a) excludes actions "of an equitable nature: from its

mandatory provisions, interest was discretionary. This Court held (at p. 482) that interest was mandatory. Judge Mansfield wrote at p. 482, note 8:

"It is doubtful that even that branch of Spector's claim which relied on a breach of a fiduciary duty would be classified as an 'action of an equitable nature.' Although fiduciary relationships have equitable underpinnings, here the nature of the relief sought was damages, and no traditional form of equitable relief was sought." (Underscoring ours)

Damages in actions "of an equitable nature" are awarded, for example, where an injunction is sought and by the time of the decree an injunction is ineffectual; where damages are incidental to equitable relief; or where some other equitable relief has become useless because of the lapse of time or change in circumstances

1 Pomeroy's Equity Jurisprudence, 5th ed. (1941)
pp. 437-443

The damages awarded here are for breach of contract to deliver shares which are readily available on the New York and other Stock Exchanges. No form of equitable action is involved.

A case on all fours was decided by Judge Ward in Marx and Co., Inc. v. The Diners' Club, Inc. 405 F Supp 1 (S.D.N.Y., 1975). Jurisdiction was based on two federal causes of action. The Court dismissed one of them and the jury decided for defendant on the other. But plaintiff had a verdict on a third cause, breach of an agreement by defendant to register plain-

tiff's unregistered shares. Judge Ward held that pre-verdict interest was mandatory under New York law, writing (at p. 3):

"Defendants argue that state law does not apply in actions where jurisdiction is founded upon a federal ground. Their argument is premised on the assertion that the doctrine of Erie Railroad v. Tompkins 304 U.S. 64, 58 S. Ct. 817, 82 Lawyers Ed. 1188 (1938) requires the application of state law only in cases within the diversity jurisdiction of the federal courts. This contention cannot be sustained. Whether state law is to be applied depends upon the nature of the issue before the federal court and not the basis for its jurisdiction. Maternally Yours, Inc. v. Your Maternity Shop, Inc. 234 F.2d 538, 540 n.1 (2d Cir., 1956); 1A J. Moore, Federal Practice ¶ 305[3] (1974).***Thus, it is the source of the right sued upon which is determinative of whether state law should be applied.

* * *

"Under New York law, the successful plaintiff in an action for breach of contract is entitled as of right to interest computed from the earliest ascertainable date the cause of action existed. N.Y. C.P.L.R. ¶5001; 5 Weinstein, Korn, Miller. New York Civil Practice ¶¶ 5001.04, .10 (1974)."

POINT IV

ALL OF THE EQUITIES ARE WITH PLAINTIFFS

Judge Ryan felt that because this Court had made a determination which Boeing, in 1958, could not have foreseen, equity required that plaintiffs' damages be held to a minimum and that no interest should be allowed (360-1).

To us, the highly visible and determinative equity lies in the facts that for eleven years Boeing has had plaintiffs' money and the use of it and that for eleven years plaintiffs have not had the use of their money. This Court and others have recognized that a person who has been deprived of his money

is not made whole without interest. This Court has said that even though defendant has not had the use of plaintiff's money, compensation requires interest where plaintiff has been deprived of his money.

Spector v. Mermelstein, supra, at p. 483

We cannot understand attaching weight to the fact that Boeing could not anticipate the decision of this Court on the merits. While Boeing may not have anticipated that it would lose this case, it surely anticipated that many plaintiffs who were entitled to stock worth more than three times the redemption price would not see the advertisement. Admittedly, Boeing made no effort to save plaintiffs that loss - Boeing relied on the express terms of the Indenture. We see no equity in Boeing's being disappointed that its perfunctory notice was insufficient.

CONCLUSION

The Judgment and Order should be modified so as to increase the damages to \$4,026,762.25 plus interest from March 29, 1966 to the date of payment.

Respectfully submitted,

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U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

VAN GEMERT
VS
BOEING

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,

COUNTY OF NY, ss:

AFRIM HASKAJ

being duly sworn,

deposes and says that he is over the age of 18 years and resides at 1481 42nd st Bklyn NY

That on the 31st day of January, 1977 19 at
he served the annexed brief for plaintiff-appellants upon
those attorneys on the second sheet of this affidavit
in this action, by delivering to and leaving with said

three each true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 31st
day of January, 1977 19

Afrim Haskaj

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 18, 1977

page two of the affidavit of Afrim ¹¹_h askaj dated Jan 31, 1977

~~XXXXX~~

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